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No. 90-646

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IN THE
Supreme Court of the United States
OCTOBER TERM 1990

IN THE MATTER OF UNITED
MARKETS INTERNATIONAL, INC., Debtor
R. DAVID LEGG,

Petitioner

vs.

W. STEVE SMITH, Trustee,

Respondent

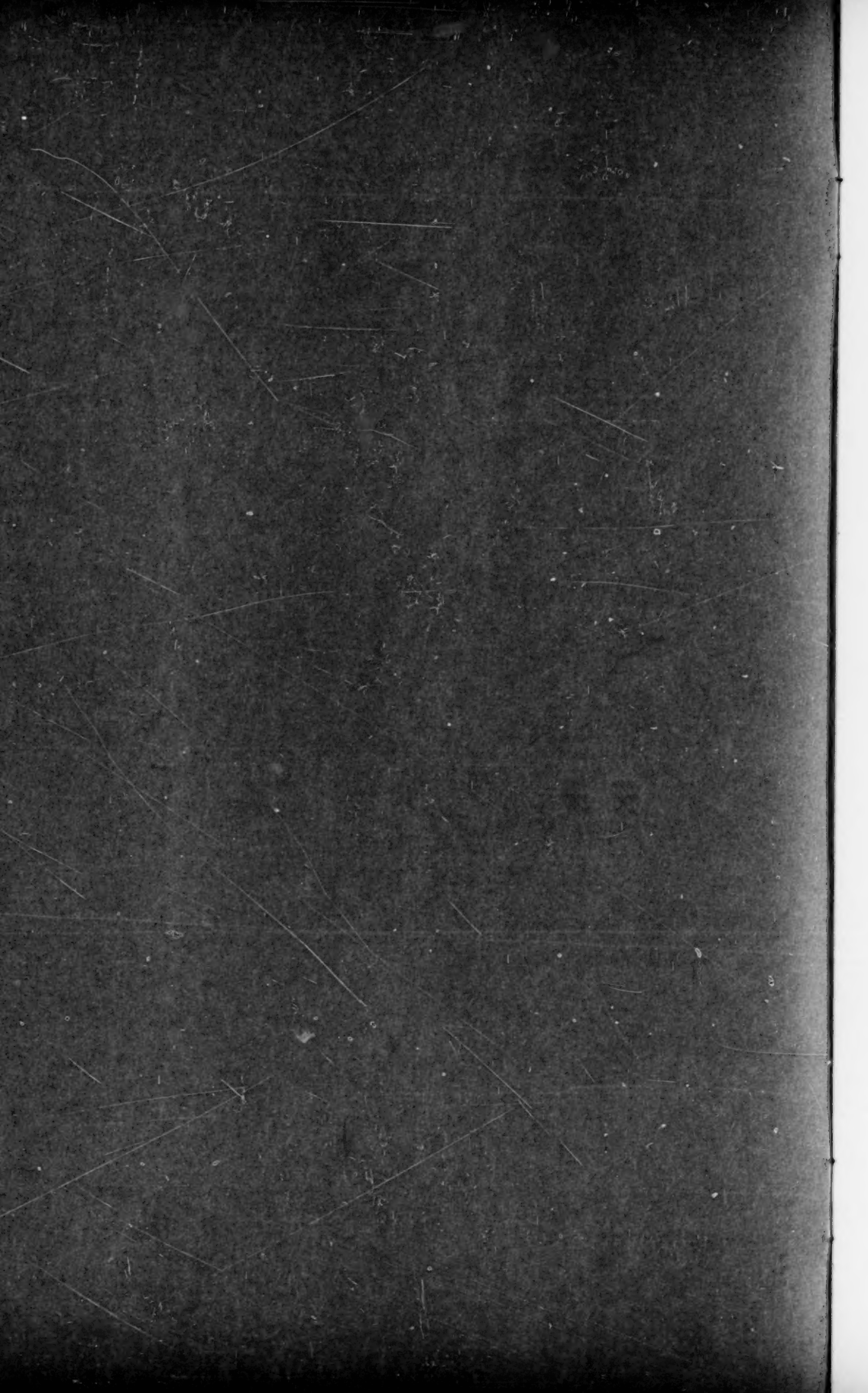
**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

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(Application
for Admission
pending)

Counsel of Record

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W. STEVE SMITH, Trustee



**RESPONDENT'S RESTATEMENT OF QUESTIONS
PRESENTED**

1. Does state law provide an exception to the "mootness doctrine" applied to 11 U.S.C. § 363(m) where a party has failed to appeal or seek stay of a bankruptcy court order authorizing sale of property and the property has been sold pursuant to such order?

2. Has Appellant been denied any right of access to the courts and any due process guarantees because of the "mootness doctrine" of 11 U.S.C. § 363(m)?

3. May property be recovered if sold pursuant to order which is not appealed or stayed?

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**SUPPLEMENT TO PETITIONER'S LIST OF
OPINIONS BELOW**

The opinion of the Circuit Judge sitting as a District Judge by designation in appointing a trustee is unpublished (App. A).

The Order for Relief and Appointment of a Trustee is unpublished (App. B).

The opinion of the district court upholding the Order for Relief is unpublished (App. D).

The opinion of the United States Court of Appeals for the Fifth Circuit upholding the Order for Relief is unpublished (App. F).

The opinion of the district court upholding the Order for Relief and Sanctions is unpublished (App. G and App. H).

The opinion of the district court denying Petitioner's Temporary Restraining Order request is unpublished (App. L).

The Final Judgment and opinion of the district court holding against Petitioner on constructive trust dated November 9, 1989 are unpublished (App. O).

The Bankruptcy Court's Order Authorizing Sale Free and Clear of the condominium unit, dated December 6, 1988, is unpublished (App. Q).

The Agreed Order dated June 18, 1989 of the Bankruptcy Court pertaining to the disposition of net sales proceeds is unpublished (App. R).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). All other allegations and statements of Petitioner in his "Jurisdiction" paragraph will be addressed in Respondent's "Statement of the Case".

ADDITIONAL STATUTES INVOLVED

11 U.S.C. § 363(e) provides:

Notwithstanding any other provision of this section, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale or lease as is necessary to provide adequate protection of such interest.

STATEMENT OF THE CASE

Respondent has since 1988, without success, pursued the overturning of the Bankruptcy Court's Order for Relief dated

March 28, 1985. Among many of his other contentions, Petitioner contends there is no jurisdiction for the judgments impressing a constructive trust upon Unit No. 1201, Bayou Bend Towers, Houston, Texas (the "condo"), Petitioner contends there is no jurisdiction for sanctions awarded against him and Petitioner contends there is no jurisdiction to order the condo sold and the proceeds distributed because the Order for Relief should be set aside. However, the Order for Relief has been upheld at the Bankruptcy Court level, the District Court level and the Circuit Court level. By his Petition to this Court, Petitioner intends to collaterally attack the Order for Relief once again. To show this attempt, as well as to present a fair, accurate history of the relevant portions of the case, requires this restatement and/or supplement by Respondent.

On February 7, 1985, an involuntary petition was filed against UMI. UMI is a Texas corporation, the principal officer and sole shareholder of which is R. David Legg ("Legg").

Thereafter, a hearing was held on a related Motion to Appoint Trustee, or in the Alternative, an Examiner. By order dated February 27, 1985, the Court appointed W. Steve Smith ("Trustee") as trustee of UMI due to:

(1) ... a sufficient showing of fraud, dishonesty, incompetence and gross mismanagement of the affairs of UMI; and

(2) the principal asset of UMI may be a cause of causes of action against ... Legg, ... for, *inter alia*, monies transferred to him or on his behalf from UMI.

(App. A, A-1 through A-3).

On March 28, 1985, an Order for Relief and Appointment of a Trustee was signed. (App. B, B-1).

No appeal of the first Order (February 27, 1985) has ever been taken, and the appeal of the second, the Order for Relief, was not noticed until May 5, 1988, well after conclusion of the trial in Adversary Proceeding No. 85-0375 and just six days before entry of the Final Judgment which impressed a constructive trust upon property Legg claims as homestead. (App. C, C-1).

By Order dated July 7, 1988, the 1988 appeal of the 1985 Order for Relief was dismissed for lack of jurisdiction due to Legg's three year delay in commencing his appeal. (App. D, D-1 through D-3).

Legg appealed this Order to the Fifth Circuit on the same issues as presented to the District Court. (App. E, E-1). The Fifth Circuit affirmed the District Court Order in its Per Curiam Order dated December 2, 1988. (App. F, F-1 through F-3). That Court further cautioned Legg against further frivolous pleadings or appeals. (App. F, F-3).

In spite of this admonishment, Legg unsuccessfully continued his efforts to obtain a vacation of the Order for Relief at the Bankruptcy Court and District Court level via Fed.R.Civ.P. 60(b). (App. G, G-1 through G-4 and App. H, H-1 through H-3). The District Court has consistently upheld the Order for Relief and found Legg's efforts to be frivolous. (App. H, H-3). The Fifth Circuit will be able to re-visit this matter due to Legg's appeal in one of the civil actions. (App. I, I-1).

Trustee did commence Adversary Proceeding No. 85-0375-H1 against Legg and others seeking to recover \$300,000.00 of UMI funds misappropriated by Legg, through another of his controlled corporate entities, Bayou Bend Realty, Inc., in the purchase of the condo. With knowledge that the bankruptcy action would be filed, title to the condo was subsequently transferred from Bayou Bend Realty, Inc. to Legg. The relief requested by Trustee was not, as stated by Legg, based upon

"fraudulent conveyance of Legg's homestead", but was rather to recover the \$300,000.00 used to acquire the condo, which, allegedly, later became the homestead of Legg. In neither of Legg's Answer nor Legg's First Amended Answer to Trustee's complaint did Legg raise any jurisdictional impediment or defense nor did Legg request a jury trial. (App. J, J-1 through J-11).

Following trial, the Bankruptcy Court entered its Findings of Fact and Conclusions of Law (*See* Appendix D to Legg's Petition for Writ of Certiorari, D-12 and D-13) concluding that the UMI estate is entitled to a constructive trust upon the condo for an amount in excess of \$300,000.00 and that any homestead claim of Legg is subject to such constructive trust. Final Judgment was entered imposing the constructive trust on the condo. (*See* Appendix C to Legg's Petition for Writ of Certiorari, C-1 and C-2). Although titled Final Judgment, this judgment was granted upon request of Trustee for entry of final judgment as to one or more but fewer than all of the claims asserted. The Bankruptcy Court in entering final judgment as to imposition of a constructive trust upon the condo ordered that all other issues raised which were not addressed by this Final Judgment would be addressed and determined separately (C-2). In fact, by Order in this adversary proceeding dated May 11, 1988, the same date as the Final Judgment, Bankruptcy Judge Wheless addressed one of these other issues ordering Legg to provide an accounting to Trustee by June 11, 1988. (App. K, K-1 and K-2).

Legg attacked the Final Judgment in both his Motion for New Trial in the Bankruptcy Court and in his subsequent appeal to the District Court on jurisdictional grounds (that the Order for Relief was void). On appeal, Legg added the homestead contention as a basis for reversal. As part of his appeal of the Final Judgment to the District Court, Legg sought a temporary restraining order to restrain imposition of a constructive trust upon the condo or foreclosure or judicial sale of the condo. (App. L,

L-1 through L-3). District Judge Hughes denied the request as a "duplicitous attempt to circumvent orders" of District Judge Black on similar requests of Legg in Civil Action No. H-88-1706. (App. M, M-1). Legg then filed his Motion requesting the District Court to stay execution of the Bankruptcy Court's Final Judgment pending hearing to set bond or security. (App. N, N-1 through N-5). Trustee is not aware of any motion to the Bankruptcy Judge for stay of the judgment. However, Legg did file in the Bankruptcy Court, contemporaneously with the filing of the Motion in District Court to stay execution, a motion to recuse Bankruptcy Judge Wheless. (App. O, O-1 through O-3). On November 9, 1989, the District Court affirmed the Bankruptcy Court's Final Judgment by its Final Judgment (which also excepted out all remaining issues in the adversary proceeding for separate determination). (App. P, P-1 through P-3).

Legg's Fed.R.Civ.P. 59 and 60 motion for reconsideration of the District Court affirmance, as well as his subsequent notice of appeal, were premised on *another* collateral attack on the Order for Relief and on the ground that the Bankruptcy Court lacked jurisdiction of this adversary proceeding because of this Court's pronouncement in *Granfinanciera, S.A. v. Nordberg*, 109 S.Ct. 2782 (1989). (App. Q, Q-1 through Q-3 and Q-6 and Q-7).

During the pendency of the appeal in the District Court, Trustee filed his motion in the same adversary, Adversary No. 85-0375-HI, seeking authority to sell the condo. Legg opposed the Motion. Following a hearing, the Court, by order dated December 6, 1988, authorized Trustee to sell the condo to Gideon G. Agar with a transfer of the various claims against the condo, including Legg's, to the proceeds of sale. (App. R, R-1 through R-5). Legg did not appeal that Order or seek stay or other relief, under § 363(e) or otherwise. The sale was conducted on January 30, 1989. Pursuant to Agreed Order dated June 18, 1989, the net sales proceeds of \$225,311.06 were distributed in partial payment

(\$157,500) of the first lien never paid by Legg on the condo, in partial payment (\$24,000.00) of the homeowner assessments never paid by Legg in regard to the condo, and in partial payment (\$46,500.00 plus some slight interest accrued) of the \$300,000.00+ constructive trust and conversion claim against Legg. (App. S, S-1 through S-4).

Trustee filed his motion to dismiss as moot Legg's appeal to the Fifth Circuit of the District Court's affirmance of the Final Judgment. This was granted by Order filed June 12, 1990. (See Appendix A to Legg's Petition for Writ of Certiorari).

REASONS FOR REFUSING THE WRIT

Legg made absolutely no effort to appeal the very Order he now complains of and which he seeks to collaterally attack in this Court — the Order of the Bankruptcy Court dated December 6, 1988 authorizing Trustee's sale of the condo (App. R). His appeal of either of the judgments imposing the constructive trust upon the condo (Appendix C, C-1 of Petitioner's Petition and App. P) does not excuse his failure to appeal the order authorizing the sale or make such Order any less final. Bankruptcy Rule 8002. Both the Bankruptcy Court and the District Court made clear their respective Final Judgments, in the adversary commenced as No. 85-0375, were only as to the constructive trust portion of Trustee's Complaint, and reserved for other final judgment the other issues, e.g., the accounting, the sale, judgment against Legg, etc. The order of December 6, 1988 authorizing the sale of the condo to Mr. Agar is a final order. *Matter of Kaiser*, 791 F.2d 73 (7th Cir. 1986); *Sulmeyer v. Karbach Enterprises*, 715 F.2d 1401 (9th Cir. 1983). Legg did not appeal this Order. Legg took no action to stay or enjoin the sale to Mr. Agar which closed on January 30, 1989. Legg wasted or waived his right of access to the Appellate Court and now seeks to excuse that act by a collateral attack on the Order of December 6, 1988 (again

presumably upon still another collateral attack upon the Order for Relief).

The exception to the "mootness doctrine" cited by Legg from *In Re Onouli-Kona Land Co.*, 846 F.2d 1170 (9th Cir. 1988) requires two elements. The first is an appeal of the order or judgment of sale which includes the proposed transferee of the property. Legg did not appeal the order authorizing the sale to Mr. Agar. Mr. Agar was not a party to his appeals of the Bankruptcy Court Final Judgment or the District Court Final Judgment, both of which imposed a constructive trust upon the condo. The second element for the exception is a state substantive right which would survive sale, e.g., a right of redemption for a stated period. Legg's homestead right, if any, in the condo was not destroyed by the action of any court. His homestead claim was made subject to actual lien indebtedness and the constructive trust in favor of Trustee. The property was sold for a stated amount, pursuant to Court Order that was not appealed by Legg. The authorized amount was less than sufficient to discharge the valid lien indebtednesses, the unpaid taxes and the constructive trust.

Texas courts and the Fifth Circuit have long distinguished between a homestead *acquired* with fraudulently obtained money and a homestead improved or enhanced with fraudulently obtained monies. *Bush v. Gaffney*, 84 S.W. 2d 759 (Tex.Civ.App. — San Antonio 1935, no writ); *Meyers v. Baylor University in Waco*, 6 S.W. 2d 393 (Tex.Civ.App. — Dallas 1928, writ refused); *First State Bank v. Zelesky*, 262 S.W. 190 (Tex.Civ.App. — Galveston 1924, no writ); *Baucum v. Texam Oil Corporation*, 423 S.W. 2d 434 (Tex.Civ.App. — El Paso 1967, writ ref. n.r.e.); *Maryland Casualty Company v. Schroeder*, 446 S.W. 2d 117 (Tex.Civ.App. — El Paso 1969, writ ref. n.r.e.); *In re Moody*, 77 B.R. 566 (S.D. Tex. 1987). In the case of acquisition, a constructive trust is imposed upon the stolen funds which are

traced into the property purchased with such funds, here the condo.

Since Legg has not been denied his homestead right, Legg appears to again collaterally attack the jurisdiction of the Bankruptcy Court in entering the Order for Relief and in entering any and all subsequent orders, or he attacks the jurisdiction of the Bankruptcy Court to enter the Final Judgment (and presumably the District Court's affirmance) imposing the constructive trust upon his interpretation of *Granfinanciera*, supra. The Order for Relief has been upheld time after time. In Adversary No. 85-0375, Legg did not contest jurisdiction and he did not request a jury trial. Had he requested a jury trial, he *may* well have been entitled to one, but that does not mean the Bankruptcy Court has lost jurisdiction. The issue of whether the Bankruptcy Court could try a jury case on a fraudulent transfer was left open by *Granfinanciera*.

Legg did not request a jury. Legg did not appeal the Order authorizing the sale to Mr. Agar. The appeal of the Final Judgment did not include Mr. Agar as a party. Texas does not recognize any right to redeem real estate. The right of Legg to a claim of homestead remained intact to the extent that equity exceeded valid first lien indebtedness, taxes and the constructive trust. No exception to the mootness rule exists. *In Re Onouli-Kona Land Co.*, supra; *In Re Sax*, 796 F.2d 994 (7th Cir. 1986); *Matter of Gilchrist*, 891 F.2d 559 (5th Cir. 1990).

The Bankruptcy Court, the District Court and the Fifth Circuit Court of Appeals have bent over backwards to allow Legg his many requested days in court. Neither the courts nor the Trustee have done anything which would deny Legg due process. There was no void order validated by any mootness doctrine. The Order for Relief has been upheld time after time after time. Jurisdiction did not evaporate by this Court's pronouncement in *Granfinanciera*, supra. The Final Judgment preserved the limited

homestead claim of Legg. The Order of December 6, 1988 authorizing the sale became final and was not appealed or stayed in any form or fashion. There is no conflict or division of opinion among the appellate courts concerning the propriety of dismissal under the circumstances of this case. Dismissal is appropriate.

CONCLUSION

The Petition for Certiorari of R. David Legg should be denied.

Respectfully submitted,

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